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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1088

FERMINA MONTEZ, on her own behalf and on behalf of her infant children, JOSE MIRINO MONTEZ and ARMANDO MONTEZ, on behalf of themselves and all others similarly situated,

Petitioners,

against

GEORGE K. WYMAN, individually and as Commissioner of the Department of Social Services of the State of New York, and JACK R. GOLDBERG, individually and as Commissioner of The Department of Social Services of the City of New York,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

On December 11, 1969 the United States District Court for the Southern District of New York (FRANKEL, J.) denied petitioner's application for a temporary restraining order and the convening of a three-judge court. The endorsement on the moving papers is quoted in the Mem-

orandum of the District Court appearing in the Appendix to the Petition for Writ of Certiorari. On May 5, 1971 the District Court (METZNER, J.) denied petitioner's motion for summary judgment to recover retroactive payments allegedly due her. The Judge's statement denying the motion is quoted in the Memorandum of the District Court appearing in the Appendix to the Petition for Writ of Certiorari. On May 7, 1973 the United States District Court for the Southern District of New York (BONSAL, J.) granted the former State Commissioner's motion to dismiss the complaint as to him for lack of jurisdiction. A copy of the unreported Memorandum appears in the Appendix to this brief. On March 25, 1974 the District Court (BONSAL, J.) granted summary judgment for the former City Commissioner. A copy of the unreported memorandum appears in the Appendix to the Petition for a Writ of Certiorari. On December 5, 1974, the United States Court of Appeals for the Second Circuit affirmed the orders of the District Court. A copy of the order appears in the Appendix to the Petition for Writ of Certiorari.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of the Court under 28 U.S.C. § 1254(1).

Questions Presented

Does a plaintiff have a basis for obtaining the issuance of an injunction against enforcement of a state regulation which was not being applied against her?

Does the repeal of a regulation render moot the issue as to whether it was constitutional?

Is a money judgment against a state for the payment of retroactive benefits barred by the Eleventh Amendment?

Statement of the Case

Petitioner on her own behalf and on behalf of her infant children sought an injunction against the enforcement of Section 353.3(a)(2) of the Regulations of the New York State Department of Social Services, and retroactive payments for alleged past deficiencies arising because of the regulation. She contended that the regulation,* which has been repealed, was unconstitutional and in conflict with federal statute.

On December 11, 1969, the District Court denied petitioner's motion for a temporary restraining order and the convening of a three-judge court. The court noted:

> "Plaintiff concedes there is no dispute as to her present or future entitlement, but only on open question as to past allowances. The basis for this motion being concededly absent, it is denied. So ordered."

On May 5, 1971 the District Court denied petitioner's motion for summary judgment. The court noted that the alleged basis of petitioner's constitutional claim was insubstantial. On May 7, 1973, the court granted the former State Commissioner's motion to dismiss the complaint for lack of jurisdiction. On March 25, 1974 the court granted summary judgment for the former City Commissioner.

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* The regulation provided:

"All available and unrestricted income of an applicant or recipient and of the spouse, if in the home, shall be prorated and applied against the needs of the applicant, the spouse and the minor children of either or both. If the spouse is possessed of income but, under exceptional circumstances, refused to make application for assistance and to have his income so applied against the needs of his family, the needs of such person shall be estimated as if he were applying for public assistance and his income applied first against his own need and any surplus against the needs of his dependents."

Reason Why Certiorari Should Be Denied

Petitioner asserts that the regulation was unconstitutional and violated federal law. She fails to set forth in the petition any basis for the assertion. See Pet. for Cert. pp. 1-2. The claim on its face is conclusory and obviously frivolous.

Furthermore at the time of the motion for a three-judge court, the regulation was not being applied against petitioner. As the District Court noted, there was no dispute as to petitioner's present or future allowances, but only an open question as to past allowances. Since the regulation was not being put into effect against her, there was no basis for granting equitable relief. See *Younger* v. *Harris,* 401 U.S. 37, 52-53 (1971); *Sosna* v. *State of Iowa,* —— U.S. ——, 42 L.Ed. 2d 532, 539.

Petitioner contends that the State should not be permitted to invoke sovereign immunity in this case. As noted above the only issue was as to past allowances. The District Court correctly ruled that it "does not have jurisdiction to direct the State of New York to make retroactive payments out of State funds for alleged past deficiencies in AFDC payments" (p. 9). As it was stated in *Edelman* v. *Jordan,* 415 U.S. 651, 678 (1974), the Eleventh Amendment defense "partakes of the nature of a jurisdictional bar" where the issue is whether retroactive payment of benefits should be ordered. See also *Rothstein* v. *Wyman,* 467 F. 2d 226, 236-237 (2d Cir. 1972), cert. denied 411 U.S. 921 (1973); *Scheuer* v. *Rhoades,* 416 U.S. 232, 237 (1974).

The issue as to whether the regulation is constitutional is moot. The suit was not a class action and the regulation was subsequently repealed. A case or controversy does not exist with respect to the validity of the regulation. See *Board of School Commissioners of the City of Indianapolis, et al.* v. *Jeff Jacobs, et al.,* —— U.S. —— 43 L.W.

4238; *Hall* v. *Beals*, 396 U.S. 45, 48 (1969); *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (1972); *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974).

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: New York, New York, March 21, 1975.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

Southern District of New York

69 Civ. 4773

Fermina Montez, on her own behalf and on behalf of her infant children, Jose Mirino Montez and Armando Montez, on behalf of themselves and all others similarly situated,

Plaintiff,

against

George K. Wyman, individually and as Commissioner of the Department of Social Services of the State of New York and Jack R. Goldberg, individually and as Commissioner of the Department of Social Services of the City of New York,

Defendants.

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Of Counsel

MEMORANDUM

BONSAL, D. J.

Plaintiff, on her own behalf, on behalf of her infant children, Jose and Armando Montez, and on behalf of all others similarly situated, instituted this action on October 31, 1969 against defendants, George K. Wyman ("Wyman"), individually and as Commissioner of the Department of Social Services of the State of New York, and Jack R. Goldberg, individually and as Commissioner of the Department of Social Services of the City of New York, seeking relief from the enforcement of § 353.3(a)(2) of the Regulations of the New York State Department of Social Services (18 N.Y.C.R.R. § 353.3(a)(2)) which requires that the income of a stepparent, in excess of his own needs which needs are defined by the State, be applied against the needs of his stepchildren in their application for assistance. The plaintiff contends that this Regulation arbitrarily assumes that the income of the stepparent is available for the support of his stepchildren and that the enforcement of this Regulation constitutes a violation of the Due Process and Equal Protection clauses of the 14th Amendment, the right to privacy, and the Social Security Act (42 U.S.C. §§ 601, et seq.) and the Regulations promulgated thereunder (45 C.F.R. §§ 201, et seq.).

The complaint alleges that plaintiff, Fermina Montez, is the mother of the infant plaintiffs, Jose and Armando Montez, 12 and 11 years old respectively; that the children's father, Jose Montez, stopped all support of the plaintiff children in June of 1968; that plaintiff, Fermina Montez, was forced to leave her job in June of 1968 to look after her children who had dropped out of school; that Fermina Montez divorced Jose Montez in October of 1968; that Jose Montez's present whereabouts is unknown; that Fermina Montez married Luis Perdomo in January of 1969; that Luis Perdomo is unable to contribute to the children's support other than the cost of shelter; that plaintiff, Fermina

Montez, received public assistance under the Aid to Families with Dependent Children ("AFDC") program on behalf of the two Montez children; that this aid continued to February of 1969 when she received a "Notice of Intent to Suspend Public Assistance"; that aid was cut off as of February 1, 1969; that at a hearing held on March 11, 1969, plaintiff was required to report her husband's income, to be figured into the calculation of her aid; that on April 2, 1969, plaintiff requested a hearing to review her treatment and that there was no response to this request. The complaint seeks the issuance of a temporary and permanent injunction, the convening of a three-judge court under 28 U.S.C. §§ 2281 and 2284, a declaratory judgment pursuant to 28 U.S.C. § 2202, and retroactive payments. The jurisdiction of this court is invoked under 28 U.S.C. § 1343(3) and (4).

This litigation has had a varied course. On December 11, 1969, Judge Frankel denied the plaintiff's application for a temporary restraining order and the convening of a three-judge court on the grounds that "Plaintiff concedes there is no dispute as to her present and future entitlement, but only an open question as to past allowances." On May 27, 1970, Judge Metzner denied an application by Delia Cancel to intervene in the action. Plaintiff then moved for summary judgment to recover $809.20 allegedly due her for the period March to November, 1969. On May 5, 1971, Judge Metzner denied this motion, stating:

> "In view of Judge Frankel's decision, this action has been limited to recovery by plaintiff of allegedly past due deficiencies during a specified period. . . .
>
> • • •
>
> "I agree with Judge Cooper that the asserted constitutional bases of plaintiff's claim are insubstantial. On the contention that the regulations are inconsistent, I would deny summary judgment since the resolution of the issue is not clear. In fact, it would appear that the result would be contrary to plaintiff's contention.

> Finally, there is serious doubt, as gleaned from the affidavits, as to whether any sum is due this plaintiff."

Defendant Wyman now moves pursuant to Rule 12(b)(1), F.R.Civ.P. to dismiss the complaint for lack of subject matter jurisdiction on the grounds that the complaint does not raise a substantial constitutional issue to invoke the jurisdiction of this court under 28 U.S.C. § 1343. *Hagans* v. *Wyman*, 471 F.2d 347 (2d Cir. 1973). Defendant Wyman further moves to amend his answer, pursuant to Rule 15(a), F.R.Civ.P., to assert the Eleventh Amendment as a bar to directing the State to make retroactive payments. *Rothstein* v. *Wyman*, 467 F.2d 226 (2d Cir. 1972), *cert. denied*, —— U.S. ——, 41 U.S.L.W. 3527 (Apr. 2, 1973).

In view of Judge Metzner's decision, the only remaining issue is whether plaintiff is entitled to retroactive payments for alleged past deficiencies in her AFDC payments.

Plaintiff does not contend that payment in satisfaction of a judgment against defendant Wyman would come from his personal resources, but assumes that payment is to come from the funds of the State of New York. Under the Eleventh Amendment, this court does not have jurisdiction to direct that the State of New York make retroactive payments out of State funds for alleged past deficiencies in AFDC payments. *Rothstein* v. *Wyman, supra; Like* v. *Carter*, 353 F.Supp. 405 (E.D.Mo. 1973). See also *Sostre* v. *McGinnis*, 442 F.2d 178, 204-205 (2d Cir. 1971), *cert. denied sub nom. Sostre* v. *Oswald*, 404 U.S. 1049 (1972).

In light of the foregoing, it is unnecessary to consider defendant Wyman's other contentions.

Accordingly, defendant Wyman's motion to dismiss the complaint as to him pursuant to Rule 12(b)(1), F.R.Civ.P., is granted.

Settle order on notice.

Dated: New York, N.Y., May 7, 1973.

DUDLEY B. BONSAL,
U. S. D. J.